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Supreme Court, U.S.
FILED

NO. 001847 JUN 12 2001

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IN THE

Supreme Court of the United States

OCTOBER TERM 2000

STEVON TODD McCARTER,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in applying a legal sufficiency of the evidence standard of review in reversing an order granting a new trial in a criminal case?

2. Did the Court of Appeals err in reversing an order granting a new trial instead of remanding to the district court to articulate the specific reasons that it granted a new trial?

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PETITION FOR A WRIT OF CERTIORARI

Stevon Todd McCarter respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The district court order granting a new trial (Appendix A), the panel opinion of the Fifth Circuit reversing that order (Appendix B), and the order denying rehearing (Appendix C) are not reported.

JURISDICTION

The Fifth Circuit reversed the district court order granting a new trial on February 23, 2001, and denied rehearing on April 2, 2001. This petition is filed within 90 days of that order. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Summary Of The Issues

Phyllis Connor pled guilty to possession of cocaine with intent to distribute and agreed to become a government informant in an effort to obtain leniency at sentencing. Thereafter, DEA agents used Connor to snare Edward Russell, an employee of a Houston rap music company, in a "sting." Connor told Russell that some associates were coming to Houston with money to buy cocaine. They discussed ways to steal both the money and the cocaine. On January 7, 1999, Connor told Russell that her associates had arrived. DEA agents put a cooler containing six kilograms of cocaine and

$90,000 of government funds in a motel room. Connor called Russell and said that she would lure her associates from the room and leave a key on the rear tire of her vehicle so Russell, or someone on his behalf, could enter the room and take the cooler.

The circumstantial evidence, based in part on cellular telephone records, suggested that Russell contacted petitioner, who in turn enlisted Eric Bradley and William Ballard to take the cooler from the motel room. Petitioner drove Russell to the motel in his vehicle, followed by Bradley and Ballard in another vehicle. As they neared the motel, Russell had a final telephone conversation with Connor, in which he asked, "Hey, that green in the cooler, too?" Connor responded that "everything" was there. Russell then said, "Everything in the cooler." Shortly thereafter, both vehicles entered the motel parking lot. Petitioner and Russell remained in their vehicle while Bradley and Ballard retrieved the key, entered the room, took the cooler, and placed it in their vehicle. DEA agents arrested all four men in the parking lot and recovered the unopened cooler.

Petitioner and Russell were tried together for conspiracy to possess and possession of more than five kilograms of cocaine with intent to distribute. Petitioner was also charged with possession of ammunition by a felon. The issue in dispute was whether the government proved that petitioner knew that the cooler contained cocaine, much less more than five kilograms. The district court denied petitioner's motion for judgment of acquittal at the close of the government's case and at the close of all the evidence. The jury convicted petitioner and Russell on the drug counts and acquitted petitioner on the ammunition count. Petitioner renewed his motion for judgment of acquittal after the verdict and, in the alternative, moved for a new trial. The district court granted a new trial.

The government appealed to the Fifth Circuit, which reversed the order granting a new trial. The Fifth Circuit, instead of analyzing deferentially whether the district court abused its discretion, conducted a legal sufficiency of the evidence analysis. The court concluded that because the evidence was legally sufficient to support the verdict, *ipso facto* the verdict was not against the weight of the evidence and did not constitute a miscarriage of justice.

The Fifth Circuit, in reviewing whether the district court abused its discretion in granting a new trial, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. At the very least, the Fifth Circuit should have remanded the case to the district court with instructions to articulate the specific reasons that it granted a new trial instead of summarily reversing the order and reinstating the jury verdict.

B. Procedural History

Petitioner was charged with conspiracy to possess and possession of more than five kilograms of cocaine with intent to distribute and possession of ammunition by a felon. A jury convicted him on the drug counts and acquitted him on the ammunition count on July 14, 1999.

The district court denied petitioner's motion for judgment of acquittal at the close of the government's case and at the close of all the evidence. Petitioner renewed that motion after the verdict and, in the alternative, moved for a new trial. The district court granted a new trial on July 29, 1999.

The government appealed. The Fifth Circuit reversed the order granting a new trial on February 23, 2001, and denied rehearing on April 2, 2001.

REASONS FOR GRANTING THE PETITION

I.

THE COURT OF APPEALS ERRED IN APPLYING A LEGAL SUFFICIENCY OF THE EVIDENCE STANDARD OF REVIEW IN REVERSING AN ORDER GRANTING A NEW TRIAL IN A CRIMINAL CASE.

An appellate court reviewing a ruling on a motion for new trial must analyze whether the district court abused its discretion. The district court ruling is entitled to deference. *United States v. Robertson*, 110 F.3d 1113, 1118 (5th Cir. 1997). An appellate court reviewing a ruling on a motion for judgment of acquittal must analyze whether the evidence, viewed in the light most favorable to the verdict, is sufficient to support the conviction. *Jackson v. Virginia*, 443 U.S. 307 (1979). The evidence is sufficient if a rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Id.*

The district court granted petitioner's motion for new trial. The Fifth Circuit, instead of analyzing deferentially whether the district court abused its discretion, conducted a legal sufficiency of the evidence analysis. The court concluded that because the evidence was legally sufficient to support the verdict, *ipso facto* the verdict was not against the weight of the evidence and did not constitute a miscarriage of justice. The Fifth Circuit applied an incorrect standard of review.

The standard for reviewing a ruling on a motion for new trial is more lenient than the standard for reviewing a ruling on a motion for judgment of acquittal. *Robertson*, 110 F.3d at

1117. The distinction between these standards of review is important. Judge Kozinski of the Ninth Circuit has written:

> Appellate deference makes sense. Circuit judges, reading the dry pages of the record, do not experience the tenor of the testimony at trial. The balance of proof is often close and may hinge on personal evaluations of witness demeanor. And because an order directing a new trial leaves the final decision in the hands of the jury, it does not usurp the jury's function in the way a judgment of acquittal does. In fact, until 1984 grants of new trial motions were not appealable. [citation omitted]. Although they are now, a court of appeals will only rarely reverse a district judge's grant of a defendant's motion for a new trial, and then only in egregious cases.

United States v. Austin, 974 F.2d 1206, 1212 (9th Cir. 1992) (no abuse of discretion to grant new trial).

Former Supreme Court Justice Hugo Black once observed, "The circuit court of appeals was right in the first instance, when it declared that it did not sit to try de novo motions for a new trial. It was wrong in the second instance when it did review the facts de novo and ordered the judgment set aside." *United States v. Johnson*, 327 U.S. 106, 113 (1946). Because a district court has the discretion to decide a motion for new trial, unless it acted arbitrarily, capriciously, or upon an erroneous concept of law, an appellate court may not substitute its judgment for that of the district court. *Gage v. United States*, 167 F.2d 122, 125 (9th Cir. 1948).

The Fifth Circuit articulated the correct standard of review at the outset of the opinion. The court then set forth the

evidence presented at trial. The court found that it was not unreasonable for the jury to conclude that petitioner was aware that both money and drugs were in the cooler to be taken from the motel room. Ultimately, the court held, "There was sufficient evidence for a rational jury to find all the elements of the crime beyond a reasonable doubt and [we] cannot say that the jury's verdict was against the weight of the evidence or constituted a miscarriage of justice." The court did not cite any authority to support this standard of reviewing a district court's order granting a new trial. The court cited only *Opper v. United States*, 348 U.S. 84, 95 (1954), which concerned a motion for severance, not a motion for new trial.

The Fifth Circuit, instead of applying the abuse of discretion standard, erroneously conducted a legal sufficiency of the evidence analysis as if the district court had granted a post-verdict motion for judgment of acquittal. Although the district court could have articulated more precisely its reasons for concluding that the verdict was against the weight of the evidence and constituted a miscarriage of justice, it applied the proper standard of review. *See Dominium Management Services, Inc. v. Nationwide Housing Group*, 195 F.3d 358,366 (8th Cir. 1999) (district court's articulation of new trial standard and statement that verdict "shocks the conscience" and would result in "miscarriage of justice" demonstrated it did not abuse its discretion in granting new trial).

The Fifth Circuit erred in conducting a legal sufficiency of the evidence analysis instead of deferring to the district court's discretion to grant a new trial. The decision below conflicts in principle with this Court's decision in *Johnson* and the decisions of the other courts of appeals cited above. This Court should grant certiorari because the Fifth Circuit, in reviewing whether the district court abused its discretion in

granting a new trial, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. SUP.CT.R. 10(a).

II.

THE COURT OF APPEALS ERRED IN REVERSING THE ORDER GRANTING A NEW TRIAL INSTEAD OF REMANDING TO THE DISTRICT COURT TO ARTICULATE THE SPECIFIC REASONS THAT IT GRANTED A NEW TRIAL

A district court "can weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict." *White v. Pence*, 961 F.2d 776, 780 (8th Cir. 1992). However, the court must articulate its reasons for reversing a jury verdict so an appellate court can scrutinize the decision. *Id.* at 781. Where the district court does not articulate the reasons for granting a new trial, the appropriate remedy is to remand the case with instructions to do so. *White v. Pence*, 961 F.2d at 782; *Vansteenburgh v. Rival Co.*, 171 F.3d 1155, 1160 (8th Cir. 1999); *United States v. Berry*, 64 F.3d 305, 308 (7th Cir. 1995).

The district court correctly observed that the issues raised by petitioner at trial "were whether he knew that the goal of the conspiracy was to steal kilos of cocaine as opposed to - or in addition to - cash, and whether he knew that kilos of cocaine in fact were in the cooler." The district court concluded, "After considering carefully the weight of all the evidence against McCarter, the court concludes that the evidence preponderates heavily against the verdict. [citation omitted]. Although the court concludes that the evidence is legally sufficient, it would be a miscarriage of justice to let this verdict stand."

The district court did not articulate its specific reasons for granting a new trial. Instead, it summarily concluded that the verdict was against the weight of the evidence and constituted a miscarriage of justice. The court's articulation of the proper standard of review in granting a new trial is sufficient to demonstrate that it acted within its discretion. *See Dominium Management Services, Inc.*, 195 F.3d at 366. Assuming *arguendo* that the statement of its reasons was too conclusory, the appropriate remedy is to remand to the district court with instructions to articulate the specific reasons that it granted a new trial. The Fifth Circuit simply reversed the order granting a new trial and remanded with instructions to reinstate the jury verdict. This Court should grant certiorari because the decision conflicts in principle with the decisions of the Seventh and Eighth Circuits cited above. SUP. CT. R. 10(a).

CONCLUSION

Petitioner requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

United States Court
Southern District of Texas
ENTERED
AUG - 3 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF	§	
OF AMERICA	§	
	§	
v.	§	CRIMINAL NO.
	§	H-99-37-SS
EDWARD DEWAYNE RUSSELL	§	
STEVON TODD McCARTER	§	

MEMORANDUM AND ORDER

Pending before the Court are the motions of Defendants Stevon McCarter and Edward Dwayne Russell for judgments of acquittal (FED.R.CR.P.29(a)) and, alternatively, for new trials (FED.R.CR. P. 33) [Docs. # 186 and 193]. The Government has filed a response in opposition to all relief requested by Defendant McCarter. *See* Response by U.S.A. as to Stevon Todd McCarter's Motion for Judgment of Acquittal or New Trial [Doc. #195]. The Court denies both Defendants' motions for judgment of acquittal and Russell's motion for new trial, but grants McCarter's motion for new trial.

This case was tried to a jury on July 2, 7-9 and 12-14, 1999. Defendants Russell and McCarter were charged with conspiracy to possess with intent to distribute cocaine in

violation of 21 U.S.C. § 841(a)(1), and with possession of cocaine and aiding and abetting in violation of 21 U.S.C. § 846 and 18 U.S.C. § 2. Both Defendants were convicted on these charges.[1]

The Court denies Defendants' motions for acquittal at the end of the Government's case and again at the close of all evidence, but expressed concern as to the Government's case against McCarter.

APPLICABLE LEGAL STANDARDS

A. Motion for Judgment of Acquittal

The Court must determine whether any reasonable trier of fact could have found that the evidence established the essential elements of the crime charged beyond a reasonable doubt. *See United States v. Ortega Renya*, 148 F.3d 540, 543 (5th Cir. 1998) (citing *United States v. Alix*, 86 F.3d 429, 435 (5th Cir. 1996)). The evidence must be considered in the light most favorable to the government, drawing "all reasonable inferences and credibility choices made in support of the verdict." *Id.* In addition, "[t]he evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, and the jury is free to choose among reasonable constructions of the evidence." *Id.* (citing *United States v. Lopez*, 74 F.3d 575, 577 (5th Cir. 1996), *cert. denied*, 517 U.S. 1228, 116 S.Ct. 1867, 134 L.Ed.2d 964 (1996). If the evidence tends to give "equal or nearly equal circumstantial support" to guilt and to innocence, however, reversal [of a verdict] is required: When the evidence is

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[1] McCarter also was charged with being a felon with possession of ammunition (18 U.S.C. § 922(g)). The jury found him not guilty of that charge.

essentially in balance, "'a reasonable jury must necessarily entertain a reasonable doubt.'" *Id.* (citations omitted).

To prove Defendants' guilt of conspiracy to possess with intent to deliver under 21 U.S.C. § 846, the Government was required to prove: (1) an agreement to violate the narcotics laws, (2) that each of the alleged conspirators knew of the conspiracy and intended to join in it, and (3) that each alleged conspirator did voluntarily participate. *See United States v. Quiroz-Hernandez*, 48 F.3d 858, 866 (5th Cir. 1995); *United States v. Pennington*, 20 F.3d 593, 597 (5th Cir. 1994); *United States v. Montoya-Ortiz*, 7 F.3d 1171, 1173 (5th Cir. 1993).

To prove a defendant's guilt of possession with intent to distribute cocaine, the Government must prove three elements beyond a reasonable doubt: (1) knowing, (2) possession of the drugs in question, (3) with intent to distribute them. *See United States v. Cano-Guel*, 167 F.3d 900, 904 (5th Cir. 1999); *United States v. Ortega Reyna* 148 F.3d at 543.

The elements concerning the Defendants' knowledge of cocaine are at issue in this case, that is, whether the evidence is sufficient to satisfy the scienter elements of each charge beyond a reasonable doubt for each crime.

B. Motion for New Trial

A court on motion of a defendant may grant a new trial if required in the interest of justice. *See* FED.R.CRIM.P. 33. "The trial judge may weigh the evidence and may assess the credibility of the witnesses during its consideration of the motion for new trial." *United States v. Robertson*, 110 F.3d 1113, 1117 (5th Cir. 1997) (citing *Tibbs v. Florida*, 457 U.S. 31, 37-38 (1982)). While

the district court's discretion is "quite broad" in considering a motion for a new trial in a criminal case, "there are limits to it. The court may not re-weigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable." *Robertson*, 110 F.3d at 1118. As stated by the Fifth Circuit, before a new trial is granted, the "evidence must preponderate heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand." *Id.* (citations omitted). Motions for new trial based on the weight of the evidence are disfavored and "should be invoked only in exceptional cases ...." *Id.* at 1119 n.11.

DISCUSSION

A. RUSSELL

The Government adduced extensive evidence through a cooperating informant, Phyllis Conner, and tape recordings she made during various phone conversations with Russell. She testified that Russell agreed to "rip off" (*i.e.*, steal) money and, if possible, cocaine from individuals Conner claimed she knew from New Orleans. In fact, there were no drug dealers; Conner was cooperating with the Drug Enforcement Agency ("DEA") in setting up a "sting operation."

When the evidence of record is viewed in the light most favorable to the verdict, as the court must for a motion for judgment of acquittal, *see Ortega-Reyna*, 148 F.3d at 543; *United States v. Robertson*, 110 F.3d 1113, 1117 (5th Cir. 1997), the evidence is legally sufficient to support Russell's conviction for conspiracy and possession of cocaine with intent to distribute. The jury heard extensive testimony from Conner about the wording and meaning of recorded conversations she had with Russell (*see* GX 1-14), as well as summaries of unrecorded conversations between Conner and

Russell. Russell's and McCarter's counsel questioned Conner at length about the accuracy of the transcripts and her interpretations of key phrases in the recordings. The jury was in the best position to assess this central witness's opinions and the credibility of her testimony. The jury found the evidence proved beyond a reasonable doubt that Russell conspired with McCarter (and others) to possess with intent to distribute, and constructively possessed, six kilograms of cocaine that other alleged conspirators recruited by McCarter took from a motel room in a closed cooler at McCarter's and Russell's direction. The Court concludes the evidence was more than sufficient on each count as to Russell. Russell's motion for judgment of acquittal, therefore, is denied.

The Court further concludes that there is no basis on which to grant a new trial to Russell. The jury's verdict on both counts must stand.

B. McCarter

The Government's evidence as to McCarter is on quantitatively and qualitatively different footing. Conner had no conversation with McCarter. While there was evidence from phone records before the jury of seven phone calls between Russell's and McCarter's cell phones on the evening and night of January 7th of the theft, the Government did not adduce any direct evidence of the contents of these conversations.

McCarter argues that no rational jury could find beyond a reasonable doubt from this evidence that he knew the cooler they planned to steal from the motel room contained a substantial quantity of cocaine, specifically, or drugs, generally. Thus, he contends he is entitled to a judgment of acquittal.

The Court, despite the misgivings expressed during trial, concludes that no judgment of acquittal is warranted in this case. When all reasonable inferences from the evidence are drawn in favor of the verdict, and all credibility choices and reasonable inferences made by the jury are accepted, the jury could have found beyond a reasonable doubt that McCarter knew kilo quantities of cocaine were in the cooler when he participated in the theft of the container from the motel room.[2] The evidence, when viewed in the light most favorable to the verdict, establishes the following: McCarter and Russell were close associates. They worked closely together in a music business called Rap-A-Lot and had many opportunities for communication with each other. They had seven conversations known to law enforcement by cell phone on January 7 (and four the preceding day).[3] Russell

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[2] This case is in the general category of "hidden compartment" or closed container cases. As a general rule, a jury may infer knowledge of the presence of drugs from the exercise of control of a vehicle containing such contraband. *See Ortega Reyna*, 148 F.3d at 544. When the drugs are secreted in hidden compartment, however, the Fifth Circuit "has normally required additional 'circumstantial evidence that is suspicious in nature or demonstrates guilty knowledge.'" This requirement stems from the Fifth Circuit's recognition that, in hidden compartment cases, there "is at least a fair assumption that a third party might have concealed the controlled substances in the vehicle with the intent to use the unwitting defendant as the carrier in a smuggling enterprise." *Id.* (citation omitted). *Id.* (citing *United States v. Resia-Trejo*, 45 F.3d 907, 911 (5th Cir. 1995)) (quoting *United States v. Anchondo-Sandoval*, 910 F.2d 1234, 1236 (5th Cir. 1990)).

[3] McCarter argued that there was no proof the cellular phone was in his possession when these calls were made, but the evidence permitted the jury to draw that inference. The evidence indicates - and McCarter's counsel in closing argument did not dispute -- that McCarter recruited the other men to steal the container. McCarter's phone called Bradley's phone and received a return call within minutes that evening. It was Bradley in fact who came to the motel and took the cooler out of the room.

believed earlier in the day that the individuals whom he and Conner were planning to "rip off" were drug dealers seeking to buy cocaine and were expected to have $100,000 in cash. Russell and Connor had agreed that they would time the "rip off" to enable the thieves to steal kilos of cocaine as well as cash. It was only the mechanics of the "rip off" that were in flux. As of 10:55 p.m. on January 7th, Russell knew from coded conversations with Conner that there were kilos of cocaine inside the cooler in the motel room. At that time, Russell and McCarter were riding in the same car, a black Volvo, driven by McCarter. At 10:37 and 10:45 p.m., respectively, McCarter had talked with Bradley to plan the theft. Bradley and Ballard had a rendezvous with McCarter in a parking lot near the motel while (or just after) Russell received by phone the details of Conner's location, details on entry into the room in which the cooler was located, and confirmation that cocaine was in the cooler. Russell told Conner, only minutes before the heist, that he was "schooling" the others on the plan. During this rendezvous, McCarter was sitting between Russell and Bradley, and heard, if not participated in, their conversation. Russell commented to Conner during the last conversation that "Everything in the cooler" and "Hey, that green in the cooler, too?". McCarter had previously demonstrated his interest in and willingness to steal from drug dealers. He had arranged and participated in a heist of $30,000 in November 1998, from people he knew wanted to purchase two kilos of cocaine.

The evidence thus supports the inference that Russell was aware that the plan included theft of kilos of cocaine, as well as cash. The jury was entitled to find that Russell wanted a trusted associate to effectuate this scheme since the value of the heist was especially high once cocaine was included. The plan involved other conspirators (Bradley and Ballard) actually stealing the items and rejoining McCarter

and Russell later. Thus, Russell needed to rely on someone he could trust completely and McCarter was such an individual. Russell expressed strong confidence in McCarter and his skill in "rip offs." The jury therefore was entitled to find that McCarter agreed to and did join a conspiracy to possess with intent to distribute cocaine (and money).[4]

This is not a case where "for every inference of guilt that may be drawn from the evidence, there is an equal and opposite benign inference to be drawn." *See and compare Ortega Reyna*, 148 F.3d at 545. Nor is this a case like *United States v. Idowu*, 157 F.3d 265, 268 (3d Cir. 1998); *United States v. Thomas*, 114 F.3d 403,405 (3d Cir. 1998) or *United States v. Martinez*, 83 F.3d 371, 374 (11th Cir. 1996), where there was no direct or circumstantial evidence from which an inference could be drawn that the defendant under consideration knew that cocaine (or the charged drug) was expected to be in the closed container handled by that defendant. McCarter's motion for judgment of acquittal therefore must be denied.

Alternatively, McCarter contends that he should be granted a new trial because the evidence heavily preponderates against the verdict and/or because the government argued outside the evidence in its closing statement.

The Court concludes that McCarter is entitled to a new trial. There is little doubt that there existed a conspiracy to steal a cooler containing money and kilos of cocaine, and that Defendants Russell and McCarter constructively possessed the cooler and thus the cocaine. The issues raised by McCarter at trial were whether he knew that the goal of the conspiracy was to steal kilos of cocaine

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[4] The jury was given a "unity of purpose" instruction.

as opposed to -- or in addition to -- cash, and whether he knew that kilos of cocaine in fact were in the cooler. The evidence against McCarter that he knew what was in the cooler was all circumstantial. He was prosecuted on evidence of knowledge and intent completely distinct from the case against Russell. The evidence against McCarter concerning the January 1999 events was limited, particularly when compared to the proof adduced as to Russell. After considering carefully the weight of all the evidence against McCarter, the Court concludes that the evidence preponderates heavily against the verdict. *See United States v. Robertson*, 110 F.3d 1113, 1117-18 (5th Cir. 1997). Although the Court concludes that the evidence is legally sufficient, it would be a miscarriage of justice to let this verdict stand. *See id.*

In addition, in light of the Government's theories and evidence in this particular case, the Court concludes that McCarter's pretrial motion for severance should have been granted. A separate trial would have permitted the jury properly to evaluate McCarter's somewhat novel defense that he knew he was planning a "rip off" of a cooler containing drug dealers' money, but did not know that kilos of cocaine were also in that cooler. McCarter's Motion for New Trial is granted. It is therefore

ORDERED that Russell's Motion for Judgment of Acquittal and New Trial [Doc. #193] is **DENIED**. It is further

ORDERED that McCarter's Motion for Judgment of Acquittal [Doc. #186] is **DENIED**, but his Motion for New Trial [Doc. # 186] is **GRANTED** .

SIGNED this 29th day of July, 1999.

/s/ Nancy F. Atlas
NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

APPENDIX B

U.S. COURT OF APPEALS
FILED
FEB 23 2001
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20920

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
VERSUS
STEVON TODD MCCARTER,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas, Houston Division
No. H-99-CR-37-SS

Before **DAVIS, BARKSDALE**, Circuit Judges, and **WOOD, Jr.***, Senior Circuit Judge.

PER CURIAM:**

* Circuit Judge of the Seventh Circuit, sitting by designation.

**Pursuant to 5th CIR.R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR.R.47.5.4.

On July 14, 1999, McCarter was convicted by a jury of conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1) and with possession of cocaine and aiding and abetting in violation of 21 U.S.C. § 846 and 18 U.S.C. § 2. McCarter filed a motion for judgment of acquittal, or, in the alternative, moved for a new trial. The district court dismissed McCarter's motion for judgment of acquittal, stating that when viewing the evidence in a light most favorable to the verdict, "the jury could have found beyond a reasonable doubt that McCarter knew kilo quantities of cocaine were in the cooler when he participated in the theft...." However, the district court granted McCarter's motion for a new trial. The government appeals. McCarter concedes that jurisdiction exists under 18 U.S.C. § 3731[1] and 28 U.S.C. § 1291 and does not contest the timeliness of the government's appeal.[2]

When the district court grants a motion for new trial, we determine whether the district court's ruling was supported by the record, and review for an abuse of discretion. *United States v. Robertson*, 110 F.3d 1113,

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[1] 18 U.S.C. § 3731 provides in pertinent part:
In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment or order of a district court... granting a new trial after verdict or judgment... except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

[2] McCarter filed a cross-appeal reiterating the argument that the evidence was insufficient to convict and asserting that double jeopardy would bar a new trial. The government filed a motion to dismiss the cross-appeal for lack of jurisdiction due to the fact that the government's appeal was interlocutory and not from a final order. This court granted the motion and dismissed the cross-appeal. *See United States v. O'Keefe*, 128 F.3d 885, 890 (5th Cir.1997) ("18 U.S.C. § 3731 [] governs interlocutory appeals by the government from orders granting new trial.").

1116-17 (5th Cir. 1997). However, although the district court's discretion is broad, there are limits. *Id.* at 1118. "The court may not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable." *Id.* (citation omitted). "The evidence must preponderate heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand." *Id.* (citation omitted). In this case, the district court noted that the evidence concerning McCarter's knowledge of the drugs was all circumstantial and "preponderate[d] heavily against the verdict." The district court concluded that while "the evidence is legally sufficient, it would be a miscarriage of justice to let this verdict stand."

To establish a violation under 21 U.S.C. §§ 841[3] and 846,[4] the government was required to prove beyond a reasonable doubt (1) the existence of an agreement between two or more persons to possess with the intent to distribute cocaine, (2) the defendant's knowledge of the unlawful purpose of the agreement, (3) the defendant's intention to join in the agreement, and (4) the defendant's voluntary participation in the conspiracy. Court's Instructions to the Jury, p.14 (R. at 301); *see Robertson*, 110 F.3d at 1118-19.

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[3] 21 U.S.C. § 841(a)(1) provides that "it shall be unlawful for any person knowingly or intentionally ... to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance ...."

[4] 21 U.S.C. § 846 provides, "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those described for the offense, the commission of which was the object of the attempt or conspiracy."

McCarter concedes his involvement in the conspiracy but maintains he never knew drugs were being stolen along with the money.[5]

The government presented evidence that there was a conspiracy to steal drugs and money on January 7, 1999, which involved a Drug Enforcement Administration ("DEA") confidential informant ("CI") who was a drug courier and had previously been arrested for possession of over two kilograms of cocaine. The CI was to inform the DEA about drug trafficking deals. The CI met Edward Dewayne Russell ("Russell") (McCarter's co-defendant) when she was employed in the entertainment business. Both Russell and McCarter worked for Rap-a-Lot Records. Russell (frontman for the conspiracy) had been under investigation by the DEA for drug trafficking since July 1998.

In approximately October 1998, after seeing the CI speaking to some well-known drug traffickers, Russell told the CI that if she "ever wanted to make some real money, let me know." The CI understood Russell to mean that he had a scheme to steal money and/or drugs from the drug dealers. (There was cumulative evidence presented about Russell's request on this topic.) In December 1998, the CI proceeded with the DEA plan to involve Russell in a theft. The CI told Russell two drug couriers she knew were coming to town and that she would assist Russell in robbing them. The planning between the CI and Russell continued, eventually evolving to robbing the dealers of both the money and the drugs they were to purchase. (Later conversations repeatedly confirmed the fact that it was to be a robbery of both money and drugs.) Russell informed the CI that he planned to bring

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[5] In his motion for a new trial, McCarter did not raise the issue of severance. Therefore, he has waived that argument. *See, c.f., United States v. Wylie*, 919 F.2d 969,978 (5th Cir. 1990).

Cedric Rodgers ("Rodgers") into the deal. Rodgers was a Houston police officer and McCarter's cousin.

On January 6, 1999 (one day before the robbery), the CI and Russell spoke on the telephone twice and met in person to finalize the robbery plans. Russell discussed a possible scenario where one of Russell's associates would approach the targeted victims and talk to them in a Puerto Rican accent. Evidence was presented that McCarter and Rodgers had previously planned to steal $30,000 in drug money. In that plan, McCarter spoke to the victim using a Puerto Rican accent. The scheme collapsed when unsuspecting fellow officers stopped to assist Rodgers in his "arrest" of McCarter and defeated Rodgers plan to confiscate the money. Also on January 6, there were four phone calls from McCarter to Russell.

On the day of the robbery, one of the ten calls made by the CI to Russell was at 6:38 p.m., at which time she gave Russell the location of the motel and the room number where she and the supposed victims were waiting. At 7:06 p.m., Russell called McCarter. At 7:20 p.m., McCarter paged Rodgers, and shortly thereafter spoke with Russell on the phone. Russell then called the CI to tell her he was sending someone over to the motel to check out the area. He told the CI he was sending over "Cash" (McCarter's nickname), whom the CI knew. Russell told the CI that McCarter was the "engineer." McCarter concedes that it was understood he was "more of an engineer," and not someone without "experience." Russell asked the CI for all the location information and told her he would pass it on to McCarter. The CI testified that she understood it was McCarter who was to be in control of the robbery.

McCarter called Russell again and then paged Rodgers a second time at 7:32 p.m. At about 8:00 or 8:30

p.m., DEA agents arrived with the CI at the location and placed a cooler with six kilograms of cocaine and $90,000 of serialized bills inside a motel room with the CI. Approximately twenty minutes later, the CI called Russell and told him everything was ready. At 9:22 p.m., Russell spoke with McCarter on the telephone. At 10:08 p.m., McCarter spoke with Russell, and at 10:10 p.m., Russell called the CI, at which time she told Russell that "her people" had purchased the cocaine. She also told him the "money and food" were in the motel room in an ice cooler. At 10:18 p.m., McCarter paged Rodgers again. At 10:37 p.m., one of the co-conspirators paged McCarter and at 10:45 p.m., McCarter spoke with the co-conspirator on the telephone. McCarter admits that the circumstantial evidence suggests that Russell contacted McCarter, who in turn enlisted two other co-conspirators who would actually commit the theft.

Russell spoke with the CI at 10:53 p.m. and asked if "the money was in the cooler, too." The CI testified that she understand him to be asking if the money was in the cooler in addition to the cocaine, and she told him "everything" was in the cooler. Russell told her they were about 30 seconds away. The DEA then observed a black Volvo and a maroon Camaro pull in front of an appliance store near the motel. The cars pulled next to each other for a short time, at which time they seemed to be having a conversation. The Volvo then drove to the motel with the Camaro following. Russell called the CI at 10:57 p.m. and she testified that Russell acknowledged someone was with him and she understood that Russell was talking to someone about what was to happen. The Volvo pulled into the motel parking lot at about 10:59 p.m. McCarter was driving with Russell in the passenger seat. Two other co-conspirators, one of whom McCarter had

spoken with earlier, were in the Camaro. The two co-conspirators in the Camaro ran to the motel room and took the cooler.

Given McCarter's close involvement in the conspiracy, his leadership role, and his frequent consultations with Russell on the planning and execution of the robbery, it is not unreasonable for the jury to conclude that McCarter was aware of all aspects of the conspiracy, and, more specifically, that there would be a double benefit of both money and drugs. It is not unreasonable to infer that as one of the planners, McCarter was aware that they had to allow for additional time in order for the fictitious drug purchasers to locate and purchase the drugs they supposedly had told the CI they wished to acquire. Testimony and recorded conversations confirm that Russell intended to arrive after the CI informed him that the drugs were also in the motel room. Even at such a late point in time as when Russell and McCarter were in the car together traveling to the motel to commit the robbery and Russell had conversations with the CI about "everything" being in the cooler, if they had not already concluded so, the jury could reasonably have inferred that McCarter was listening to the conversations and was aware that both money and drugs were to be taken.

In response to McCarter's motion for a new trial, the district court concluded that the evidence was legally sufficient to support the jury's conviction. The government is not required to offer only direct evidence. *See Robertson*, 110 F.3d at 1119. We trust that the jury carefully followed the instructions in weighing the evidence and arriving at its verdict.[6] *See Opper v. United States*, 348 U.S. 84, 95

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[6] McCarter was also charged with being a felon in possession of ammunition under 18 U.S.C. § 922(g). The jury found him not guilty of that charge.

(1954) ("Our theory of trial relies upon the ability of the jury to follow instructions."). Even though circumstantial, we conclude that there was sufficient evidence for a rational jury to find all of the elements of the crime beyond a reasonable doubt and cannot say that the jury's verdict was against the weight of the evidence, or constituted a miscarriage of justice. *See id.* Therefore, we reverse the district court's order of a new trial and remand with instructions to reinstate the jury's verdict of guilty.

REVERSED AND REMANDED.

APPENDIX C

U.S. COURT OF APPEALS
FILED
APR 2 2001
CHARLES R. FULBRUGE, III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20920

UNITED STATES OF AMERICA
Plaintiff - Appellant
v.
STEVON TODD MCCARTER
Defendant - Appellee

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

Before DAVIS, BARKSDALE, and WOOD, Jr. *, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

*Circuit Judge of the Seventh Circuit, sitting by designation.